

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy Statement)	GC Docket No. <u>92-52</u>
on Comparative Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

To: The Commission

REPLY COMMENTS
OF
POSITIVE ALTERNATIVE RADIO, INC., ET AL.

Comes now **Positive Alternative Radio, Inc., et al ("PAR")**¹, by Counsel, and pursuant to the *Notice of Proposed Rule Making ("NPRM")*, FCC 97-397 (*released November 26, 1997*) hereby submits these Reply Comments in the above-captioned rule making proceeding in response to Comments filed January 26, 1998 by Grace Communications, L.C. ("Grace"). In reply, PAR submits the following:

1. Both PAR and Grace are mutually exclusive applicants for a new

¹ PAR and/or its principals -- Vernon H. Baker, Virginia A. Baker and Edward A. Baker -- either individually or through various corporations, is the licensee or permittee of over thirty radio stations.

FM Construction Permit at Shawsville, Virginia.² To a large degree, Grace's Comments address the steps the Commission should take to select the permittee for Shawsville. Although PAR agrees with many of Grace's comments, there is, nevertheless, disagreement between PAR and Grace on certain aspects that might ultimately prove decisive to the selection of the Shawsville permittee.

2. Grace urges the Commission to adopt the use of a truncated comparative hearing for pending applications for new broadcast stations wherein the Commission would resolve such applications through the use of a diversification standard. PAR also agrees that the use of hearing proceedings would result in a more equitable distribution of permits and licenses, since invariably auctions favor only the rich and powerful. However, PAR does not believe that the diversification standard should be the most decisionally significant factor. The Commission must not forget about localism. With the deregulation of broadcast ownership restrictions, it is no secret that numerous nationwide and regional companies are expanding with lightning speed. Once these companies achieve market dominance, local employees are often fired, and "canned" programming and management techniques are adopted.

² PAR is the Licensee or Permittee of the following noncommercial radio stations: WPIM-FM (Martinsville, VA), WPIR-FM (Hickory, NC), WPAR-FM (Salem, VA), WPIN-FM (Dublin, VA), WPVA-FM (Waynesboro, VA), WPER-FM (Culpeper, VA), WCQR-FM (Kingsport, TN), WPIB-FM (Bluefield, WV), WXRI-FM (Winston-Salem, NC), WWMO-FM (Asheboro, NC), WOEL-FM (Union City, IN), WOKD-FM (Danville, VA), and WPCN-FM (Pt. Pleasant, WV). PAR is also an applicant for new Noncommercial Radio Stations at the following locations: (1) 91.7 MHz at Lynchburg, VA (FCC File No. BPED-950628MA), (2) 91.1 MHz at Ashland, KY (FCC File No. BPED-960328MC), (3) 91.5 MHz at Hurricane, WV (FCC File No. BPED-960328MI), (4) 88.1 MHz at Beckley, WV (FCC File No. BPED-960502MH), (5) 90.3 MHz at Galax, VA (FCC File No. BPED-970625MD), and (6) 102.5 MHz at Shawsville, VA (FCC File No. BPED-971021MF).

3. Whatever selection process the Commission decides upon, there must be some mechanism by which local ownership is rewarded. For example, PAR's principals are all local, each having resided most of their entire life within approximately seven miles from Shawsville. PAR is intimately familiar with the interests and needs of the local citizenry, and will be much more responsive as compared to any out-of-town applicant.³

4. PAR agrees with Grace that the Commission should not impose its new auction rules upon applicants who submitted their applications prior to the adoption of a final order in this proceeding. Although the Commission's selection process for broadcast applicants has been in a state of uncertainty for the past several years due to such court cases as *Bechtel v. FCC*,⁴ at not time did the FCC "freeze" new broadcast station filing opportunities. Applicants reasonably expected that a similar but modified selection process would remain. For the Commission to subsequently, after the fact, impose a dramatically new selection process is a flagrant violation of due process.

5. As PAR indicated in its original Comments, it agrees with Grace that filing windows (such as Shawsville) that have already opened and closed should not be re-opened to permit new participants. Applicants, such as PAR in Shawsville, Virginia, expended a lot of time and money to prepare and file an

³ The Commission should take notice that PAR is already providing local broadcast service to the Shawsville-Blacksburg area on FM Translator Station W273AA (102.5 MHz), licensed to Blacksburg, Virginia. Station W273AA also provides service to Christiansburg, Virginia, and provides unique local programming service to approximately 75,000 people overall. Once the new FM station at Shawsville commences operations, W273AA will have to shut down. Since PAR stands committed to continuing its local FM broadcast service to the Shawsville-Blacksburg area, PAR plans to aggressively prosecute its Shawsville application.

⁴ 10 F.3d 875 (D.C. Cir. 1993)

application within the time frame previously mandated by the Commission. PAR's application was prepared in response to a specific Commission "Report and Order," which did not indicate there would be any opportunity in the future to apply for the broadcast channel beyond the specific filing window dates. PAR reasonably relied on the terms of the "Report and Order," and any change now to those terms would be nothing more than a "bait and switch" tactic by the Commission.

6. It would be a flagrant violation of due process to now disregard a previously announced deadline and require new entrants, especially since new entrants would only be required to file a short-form application. As noted above, the Commission must be reminded that is not permitted to base a finding of public interest, convenience, and necessity on the expectation of Federal revenues that would result from the use of competitive bidding. See, §309(j)(7) of the *Communications Act*. The potential revenue that might ensue from broadening the bidding pool in these instances does not outweigh the injustice that would occur if due process and previous FCC directives were now disregarded. And, this would never pass the Supreme Court's due process test, as set forth in *U.S. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983).⁵

7. PAR would also to take this opportunity to encourage the Commission to heed Grace's suggestion that all remaining pending mutually exclusive applications -- including those filed after July 1, 1997 such as

⁵ In the NPRM at footnote 11, the Commission cites to *DIRECTV v. FCC*, 7 CR 758 (D.C. Cir. 1997) for the proposition that the Commission may change its rules (i.e., re-opening previous filing windows) without violating due process. The Commission's reliance on *DIRECTV* is misplaced because in that instance the Court specifically noted that "the Commission did not reopen a previously closed processing round .." *Id.*, 7 CR 758 at 766.

Shawsville -- be permitted an opportunity to negotiate a settlement prior to the imposition of any new selection or auction procedures. The Conference Report that Grace cites to is abundantly clear -- the Commission must still consider "negotiations or other tools that avoid mutual exclusivity." 1997 (No. 7) U.S.C.C.A.N. 176, 192. The Commission's refusal to entertain any type of settlement procedures for post-July 1, 1997 applications is a blatant contradiction of Congressional intent.

Conclusion

WHEREFORE, the above premises considered, PAR encourages the Commission to adopt the suggestions noted not only in its original Comments but also herein to ensure a more fair and equitable regulatory atmosphere.

Respectfully submitted,

POSITIVE ALTERNATIVE RADIO, INC.

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February 19, 1998

CERTIFICATE OF SERVICE

I, Cary S. Tepper, Esquire, hereby certify that on this 19th day of February, 1998, I have served a copy of the foregoing **"Reply Comments of Positive Alternative Radio, Inc."** first-class, postage-prepaid, on the following:

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A handwritten signature in cursive script, reading "Cary Tepper".

Cary S. Tepper, Esq.